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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.R. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. G.V., Defendant and Appellant.	E037337 (Super.Ct.Nos. J184262-65) OPINION

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor, Judge. Reversed and remanded with directions.

Nicole A. Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the introductory paragraphs of this opinion and part 4 of the "Discussion" are certified for publication.

Ronald D. Reitz, County Counsel, Dawn M. Messer and Michael A. Markel, Deputy County Counsels, for Plaintiff and Respondent.

Richard Pfeiffer, under appointment by the Court of Appeal, for Minors M.R. and J.R.

Sharon M. Jones, under appointment by the Court of Appeal, for Minors G.R. and P.R.

G.V., (hereafter mother) appeals from the trial court's order denying her Welfare and Institutions Code section 388[1] petition and from the subsequent orders terminating her parental rights to her two younger daughters, M.R. (M.) and J.R. (J.), and establishing guardianships for her two older children, P.R. (P.) and G.R. (G.). With respect to the order denying her section 388 petition, mother contends that the trial court abused its discretion. In challenging the termination of parental rights, mother contends that she demonstrated that the exceptions apply under section 366.26, subdivisions (c)(1)(A) and (c)(1)(E), for a beneficial relationship and sibling relationship, respectively. Mother also contends that G. was denied effective assistance of counsel, and that the trial court improperly delegated visitation with P. and G. to the legal guardians.

In the published portion of this opinion we hold that the trial court improperly delegated to the legal guardian the power to decide whether mother would be allowed to visit her two older children, P. and G. Therefore, we will reverse that order and will

[1] All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

direct the trial court, on remand, to make a new visitation order that specifies both the frequency and duration of mother's visits. In the unpublished portion of this opinion, we hold that mother met her burden of demonstrating that the beneficial relationship exception to parental rights termination applies in this case. Therefore, we will reverse the judgment terminating mother's parental rights to J. and M. and will remand the matter to the trial court for a new section 366.26 hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are not in dispute. Mother and father[2] have lived together for many years and have four children, a 15-year-old daughter P., an 11-year-old son G., a nearly three-year-old daughter J., and a 16-month-old daughter M.[3] On September 15, 2002, San Bernardino County Department of Children's Services (hereafter DCS) took the children into protective custody when San Bernardino police officers arrested mother and father after the police found what appeared to be a pseudoephedrine extraction lab set up in a trailer behind the house where mother and father lived with the children.[4] After

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[2] Father is not a party to this appeal.

[3] We refer to the ages of the children at the time the dependency petition was filed.

[4] In his statement to the social worker father admitted he was involved in extracting pseudoephedrine from pills in order to produce a component used in crystal methamphetamine. He claimed, however, that he was not actually manufacturing the final product. The pertinent police report states that "officers located a large scale pseudoepitedrine lab in progress. Glasswear [*sic*], tubing, heating elements with staining, muriatic acid, denatured alcohol, binder and filters containing suspected red phosphorous are items consistent with the manufacture of methamphetamine were also located on the property along with a marijuana plant."

the arrest of mother and father, DCS filed petitions alleging that all four children came with the provisions of section 300, subdivisions (a), (b), and (g), in that they were at risk of serious physical harm from which mother and father failed to protect them because the children had access to the trailer where the police found the drug lab; that mother and father had substance abuse problems that affected their abilities to parent; and that the children had been left without provision for support because mother and father had been arrested.

At the detention hearing on September 18, 2002, the trial court, among other things, ordered weekly supervised visitation with all the children for mother. Before the jurisdiction hearing, DCS placed the children in foster care with paternal aunts. The three girls were placed with one aunt, and G. was placed with a different aunt.

In the report prepared for the combined jurisdiction and disposition hearing the social worker stated that mother denied any involvement with the drug extraction lab found on the property, although mother admitted she suspected something was going on. Mother feared that if she pressed father on the issue he would get angry with her so mother stayed inside the house and allowed the children to play only in the front yard. Mother also denied using drugs, a claim substantiated by a negative result on her first drug test. Father admitted the allegations against him and also insisted that mother was not involved with the drug lab.

The social worker also included interviews with members of father's family, specifically, two of his sisters and his father, in the report for the jurisdiction and disposition hearing. One sister confirmed that mother was devoted to raising her children

and was a good wife and mother. The other sister stated that mother wanted to succeed in life but that father held her back and kept her from achieving her goals. Father's father acknowledged that mother was raising the children properly. He also agreed that he and his wife would provide a place for mother and the children to live until mother could get on her feet. The social worker also interviewed mother's older children, P. and G., both of whom stated that their mother did not use drugs and confirmed that they did not know what had been going on at their home.

With respect to visitation, the social worker reported that mother visited the children on weekends. The paternal aunts/foster parents acknowledged that mother deeply loved her children. The social worker described mother's interaction with the children as "consistent and appropriate during all visits." The social worker observed that the children were "well bonded" with each other. According to the social worker, the children all seemed to be well adjusted and "presented as children who come from a loving and caring family."

Mother told the social worker that she would do whatever the court required of her in order to reunite with her children, including living on her own, separate from father. In the social worker's view, mother did not present a threat to the children: "She and her children seem to have fallen victims to [father's] careless and irrational thinking. [Mother] and her children are fortunate and lucky to have the support of [father's parents] who are willing to step in and help the family."

At the combined jurisdiction and disposition hearing on October 9, 2002, the trial court found, after mother and father submitted on the petition, that the children came

within the provisions of subdivision (b) of section 300. The court declared the children to be dependents of the court and ordered reunification services and unsupervised visitation with the children for mother. The court also authorized the social worker to place the children with mother when mother moved into the paternal grandparents' home.

By the time of the six-month review hearing on April 9, 2002, mother was living with the paternal grandparents. The children, however, were all still in their respective foster placements. The paternal grandparents had asked mother to move out because she was unable to pay rent.[5] Mother worked as a house cleaner one day a week and earned $40. Mother had not worked outside the home during the 16 years she and father had lived together because father wanted her to stay at home and raise the children. Mother asked the social worker for rent assistance. The social worker reported that she had advised mother to get a job.

Although the social worker expressed the view that mother made minimal progress on her reunification service plan, the social worker also reported that mother had completed parenting classes and was enrolled in individual counseling. In addition, mother had recently enrolled in "an outpatient treatment program."[6] Mother apparently had been incarcerated for some undisclosed period of time during the six months between

[5] The social worker's report does not disclose how long mother had been living with the paternal grandparents or why the children had not been placed with mother.

[6] The social worker's report does not specify the nature of the treatment program. We assume the program addressed substance abuse.

the disposition and review hearing.[7] Although mother consistently denied using drugs, her drug test results in February and April were positive for amphetamines.[8] When the social worker confronted mother with the drug test results mother said, "[T]hat is not true; I have never use drugs. Maybe is because I was sexually involved with my lover and he is taking drugs, or maybe it is the herbal tea I took." (*Sic.*) The social worker reported that mother had weekly unsupervised visits with the children and telephoned them nightly.

At the six-month review hearing on April 30, 2003, the trial court ordered six additional months of reunification services for mother after mother submitted on the social worker's report. The trial court also set a 12-month review hearing.

On May 8, 2003, the social worker reported that future visits between mother and the children would take place at the DCS office rather than at the children's foster homes. The social worker made the change because, although she had been counseled not to, mother had again asked P. for money. Mother also telephoned the girls' foster home

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[7] Although not recounted in any of the social worker's reports, as a result of her arrest on September 12, 2002, mother apparently was convicted of a crime for which she was placed on probation.

[8] The trial court, at the social worker's request, modified the visitation order and directed that mother's visits with the children be supervised after the positive drug test in April. In addition to that test, the social worker reported to the court that mother had been inappropriate with the children, first by discussing the positive drug test result in their presence, and second by going to P.'s place of employment and asking to borrow $30 from her.

many times a day, and at all hours. The girls' aunt/foster mother had asked mother to call at a "decent" time but, according to the social worker mother would not cooperate.

According to the social worker's report for the 12-month review hearing scheduled for October 30, 2003, mother had completed a parenting class and a substance abuse treatment program. Mother also continued "to attend individual counseling" to address issues of substance abuse and domestic violence. In July, mother reported to the social worker that she had an altercation with father that had resulted in mother being deeply cut on the hand and fingers.[9] A bystander contacted the police who arrested father a few weeks later.

The social worker reported that mother continued to display a lack of parenting skills as evidenced by mother's reaction to a cancelled visit with the children. Mother had not been informed that the aunt/foster mother had an emergency and could not keep the scheduled visit. When mother arrived at the DCS office and was told that the visit had been cancelled, mother immediately telephoned P. and screamed at her over the phone. Mother told P. that "she should have informed [mother] about the visit being cancelled. [Mother] was putting the responsibility on her daughter about the cancelled visit, and she refused to listen to the emergency that [aunt/foster mother] had."

[9] The social worker's report does not include any details regarding the altercation and states only that mother reported that father was angry with her because she wants to leave him. The report does not disclose how mother's injury occurred and therefore we do not know whether father caused that injury.

The social worker also expressed the view that mother "continu[ed] to be inappropriate during her visits and is defying the Court Order" as evidenced by the fact that unbeknownst to the social worker, mother gave P. a cell phone during a supervised visit. The day after the visit, the aunt/foster mother told the social worker about the cell phone. The social worker immediately met with mother "to discuss the issue regarding supervised contacts, which was part of the Court order on April 28, 2003." The social worker and mother then went to the aunt/foster mother's home to discuss the issue with P. who apparently understood and apologized. Mother stated that she knew it was wrong to give P. a cell phone but explained that she did so because she needed to have more contact with her daughter.

The social worker also reported that mother displayed a "negative attitude" about the fact that her phone calls with the children were monitored.[10] In addition, G.'s foster mother reported that mother had twice called at 10:00 p.m. and because mother was rude, the foster mother complained to the social worker. Despite the complaints, the social worker reported that supervised visits between mother and the children "tend to go well." Mother "tends to bring food, clothing or toys for the children." In the social worker's view, mother "appears somewhat immature in dealing with her daughters. She speaks about superficial and material things. However, she does exhibits [*sic*] love and concern for her children's welfare.

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[10] The social worker indicated that the report documenting mother's negative attitude was attached to the status review report but there are no attachments to the 12-month status review reports included in the record on appeal.

The social worker also reported that mother had completed a substance abuse treatment program even though mother continued to deny that she had a substance abuse problem. Mother had not completed "domestic violence individual counseling" and as of September 2003 had only recently started to address the issue. Mother had also "recently obtained employment."[11] According to the social worker, "it continues to be disturbing to see the amount of resistance and denial that [mother] has in regards to the issues (i.e., domestic violence, drug usage, and codependency) that lead [*sic*] the children to be placed in protective custody to begin with." Mother has become "extremely angry" with the foster parents, the social worker and the children as a result of which "she refuses to work with the foster parents and [the social worker]."

At the 12-month review hearing on October 30, 2003, the trial court, in accordance with the social worker's recommendation, ordered six additional months of reunification services and directed mother to complete another parenting class and an anger management class. When mother expressed frustration and stated that she had done everything she had been directed to do, the court explained that it was not enough for mother to complete the specified courses; mother must also demonstrate that she is able to apply what she has learned. The trial court set the 18-month review hearing for April 29, 2004.

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[11] The social worker does not reveal the nature of mother's employment in her report.

In the 18-month status review report, the social worker stated that mother had been arrested on March 2, 2004, for violating probation, and that she was expected to serve four months in jail.[12] Before her arrest, mother had not completed the additional parenting class or the anger management class that had been added to her service plan at the 12-month review hearing. Mother had rented a home in March but was arrested on March 2, 2004. When the social worker visited her in jail, mother asked for six more months of reunification services because 18 months had not been enough time to complete the requirements. In addition to denying that she had a substance abuse problem, mother also had not completed individual counseling to address domestic violence issues.[13]

The paternal aunt/foster mother with whom the girls had been living asked that G. also be placed with her. The aunt/foster mother and her husband had agreed to become legal guardians of all four children. Therefore, the social worker recommended in her report for the 18-month review hearing, that reunification services be terminated, that the

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[12] The social worker's report does not include any information on the probation violation beyond the fact that it occurred. Because mother did not have a criminal record until her arrest in September 2002, we assume the probation violation is connected with the September arrest. We can only speculate about the basis for the probation violation. It occurs to us from the fact that the probation officer informed the social worker that he was recommending mother be given 270 days in jail, that mother might have been serving her original jail time on weekends and that she might have violated her probation by failing to report.

[13] Although the social worker repeatedly refers to purported domestic violence issues, the social worker's reports do not include any facts regarding incidents of domestic violence.

trial court set the selection and implementation hearing, with guardianship or long-term foster care as the permanent plan.

At the 18-month review hearing on May 4, 2004, the trial court followed the social worker's recommendations. The court terminated reunification services, directed DCS to initiate guardianship proceedings for all four children, and set the selection and implementation hearing under section 366.26 for September 2, 2004.

By the time of the selection and implementation hearing on September 2, 2004, the aunt/foster mother and her husband were willing to adopt all four children. However, P., who was then 17 years old, did not want to be adopted. Although G. too preferred guardianship to adoption, the social worker recommended adoption as the permanent plan for G., J., and M. Because the permanent plan recommendation for three of the children had changed from guardianship to adoption, the trial court continued the selection and implementation hearing to November 2.[14]

On October 27, 2004, mother filed a section 388 petition requesting modification of the order terminating reunification services. Mother requested that the order be modified to provide either that the children be returned to her under a family maintenance plan, or that the court provide her an additional six months of reunification services. Mother alleged that circumstances had changed and warranted the requested modification

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[14] By the time of the hearing in January 2005, the social worker again recommended guardianship for G., presumably because he objected to being adopted. (See § 366.26, subdivision (c)(1)(B), which creates an exception to termination of parental rights when "[a] child 12 years of age or older objects to termination of parental rights."

because she had obtained stable and permanent housing; she had completed an outpatient substance abuse program; she had completed an anger management program; and had completed two parenting education programs. Mother attached certificates of completion to her petition.

The trial court conducted hearings on the section 388 petition and on selection and implementation on January 4, 2005. The trial court denied the section 388 petition, finding mother had failed to demonstrate changed circumstances and in any event the requested modification was not in the best interests of the children.

In accordance with the social worker's recommendation, and after mother testified and expressed her opposition to the proposed permanent plans, the trial court found that termination of mother's parental rights would be detrimental to G. and P. because mother had maintained regular visitation with them and they would benefit from continuing their relationship with her. Therefore, the trial court ordered guardianship as the permanent plan for G. and P.[15] With respect to the younger daughters, J. and M., the trial court terminated mother's parental rights after finding that the girls were adoptable and that none of the exceptions under section 366.26, subdivision (c)(1), to termination of parental rights applied.

Additional facts pertinent to the issues mother raises on appeal will be recounted below.

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[15] P. had advised the social worker that she preferred guardianship to adoption because when she turned 18 in June 2005, she intended to move out of the aunt's house and into a place of her own.

DISCUSSION

We first address mother's claim that the trial court abused its discretion in denying her section 388 petition.

1.

DENIAL OF SECTION 388 PETITION

Mother contends the trial court's denial of her section 388 petition was an abuse of discretion because she established changed circumstances and the proposed modifications were in the best interests of the children. We disagree.

Section 388 provides, in pertinent part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

The moving party has the burden under section 388 to prove "by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make [the proposed modification] in the best interests of the child. [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) In ruling on such a motion, the juvenile court's task is to determine whether the moving party has demonstrated by a preponderance of the evidence that there is new evidence or changed circumstances to warrant the proposed modification and that the requested modification is in the best interests of the child. (*Ibid*.) On appeal, we review the juvenile court's ruling for abuse of discretion. (*In re*

Jasmon O. (1994) 8 Cal.4th 398, 415-416 [“The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion”].)

Reviewing mother’s section 388 petition according to the above-noted standard, we must conclude that she failed to demonstrate a change in circumstance that would warrant either of the proposed modifications.

As set out above, mother alleged in her petition that circumstances had changed because she had obtained permanent housing and had completed the two requirements in her amended reunification plan -- that she take a second parenting class and complete a class in anger management. The social worker reported in response to mother’s modification petition, that mother had yet to complete domestic violence counseling or attend a county certified domestic violence prevention plan. The specific reason for the domestic violence counseling requirement is not revealed in the social worker’s reports.[16] As set out above, the social worker recounted one incident in which mother cut her hand during an altercation with father but the social worker does not disclose the circumstances surrounding the altercation or the cause of the injury to mother’s hand. Despite the lack of factual detail, mother did not object to imposition of the requirement.

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16 The reports contain oblique references to domestic violence, such as G.’s request that he be allowed to live with his mother because G. “is afraid that his mother may be in danger of getting ‘beaten-up or mistreated’ by her new boyfriend.” In addition, P. is reported to have shared with the paternal aunt and uncle “her parents[’] history of domestic violence which resulted in multiple interventions from law enforcement.”

As a result, the domestic violence counseling component became a condition of mother's reunification plan.

Because mother did not show that she had addressed the domestic violence issue by attending counseling, she did not demonstrate changed circumstances that would warrant granting her section 388 petition for modification of the previous placement orders. Accordingly, we must conclude that in denying that petition the trial court did not abuse its discretion.

2.

FAILURE TO FIND EXCEPTIONS TO PARENTAL RIGHTS TERMINATION

Mother next contends that the beneficial relationship and sibling exceptions to parental rights termination apply in this case. Therefore, mother contends it was error for the trial court to terminate her parental rights to J. and M. We agree with mother's claim regarding the beneficial relationship exception, for reasons we now explain.

A. Beneficial Relationship

Section 366.26, subdivision (c)(1) provides that if the court finds the child is likely to be adopted, the court shall terminate parental rights and place the child for adoption "unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (A) The parents or guardians have maintained regular visitation and contact with the child and child would benefit from continuing the relationship."

In addressing mother's claim that the above-noted exception applies, we begin with the presumption in favor of adoption as the permanent plan: "[W]hen the court has

not returned an adoptable child to the parent's custody and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) With respect to the beneficial relationship exception, "The parent has the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A). . . . Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Ibid*.)

In this case there is no dispute that mother regularly visited and maintained contact with all of her children during the course of this dependency.[17] In fact, mother's desire for more contact with her children caused her to get angry with the caretakers and to behave inappropriately. That anger and inappropriate behavior resulted in the additional six months of reunification services that in turn resulted in mother's ultimate failure to reunify. Mother notes that the trial court found that the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(A), applied to P. and G. and, in doing so, the trial court necessarily found that she maintained regular visitation and contact with

[17] DCS claims that mother visited the children only four times between April 2004 and November 2004 and when asked by the children why she was not visiting them mother said she had been busy. The pertinent portion of the record indicates that the four visits occurred between April 2004 and September 2004. That coincides with the period of time mother was in jail for the probation violation. Mother's incarceration presumably explains why her visits were infrequent and also why she claimed to have been busy rather than explain to the children that she had been in jail.

them.[18] Because she visited all four children at the same time in the DCS office, mother argues that she also regularly visited and maintained contact with J. and M. We need not draw the inference mother urges. Under any view of the record mother clearly maintained regular visitation and contact with all of the children.

The more difficult question is whether mother demonstrated that J. and M. would benefit from continuing their relationship with her. The beneficial relationship exception applies only if "'the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; accord, *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1341-1343; *In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1369; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) We assess whether the children would benefit from continued contact with mother in the

[18] Because P. and G. were both over the age of 12, and objected to termination of mother's parental rights, the trial court could also have relied on the exception to parental rights termination in section 366.26, subdivision (c)(1)(B).

context of the actual visitation mother was afforded under the reunification plan. (See *In re Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1537-1538.)

Viewing the evidence in this case according to the above-noted standards, we conclude that mother met her burden of showing that the beneficial relationship exception applies and precludes termination of her parental rights to J. and M. At the outset, we note that at the 18-month review hearing DCS recommended that the trial court find that termination of parental rights was not in the best interest of any of the children. The only change that occurred between that hearing and the selection and implementation hearing was that the paternal aunt and uncle had apparently expressed a desire to adopt the children. Their willingness to adopt should not negate the previous finding that it is not in the children's best interest to terminate mother's parental rights.

More importantly, the evidence presented in the trial court amply demonstrates that termination of mother's parental rights is not in the children's best interest. That evidence includes the fact that M. was 16 months old and J. was almost three years old when removed from mother's custody in September 2002. Although young, these children were not infants when this dependency was initiated and had lived more than half of their lives with their mother by the time of the selection and implementation hearing. During the two years M. and J. were separated from their mother, they had regular, consistent, and positive contact with her. As the initial social worker's report indicates, at the time they were removed from mother's care, the children all seemed well adjusted and "presented as children who come from a loving and caring family." The siblings appeared to be bonded to each other. Mother's visits were consistent and she

was appropriate during all her visits. The foster parents reported early on that mother really loves her children deeply and that she cries with her children because they want to be reunited.

In the six-month status review report, a second social worker reported that mother is loving with her children during visits and "is concerned about their everyday needs. The children love their mother and cry when she leaves." For the 12-month status review hearing, the same social worker reported that mother brings food, clothing, and toys to her visits with the children and "exhibits love and concern for her children's welfare." According to the social worker, M. and J. "appear more excited to see their mother than [P.]."[19] By the 18-month status review hearing, the social worker reported that if reunification fails, the children want to remain in the home of their paternal aunt. The clear inference from the observation is that the children preferred to reunify with their mother. In the selection and implementation hearing report M. and J. are said to have requested visits with mother who had visited less frequently for several months, presumably because she had been in jail. Finally, we note that mother testified at the selection and implementation hearing that the children were bonded with her.

DCS did not present any evidence in the trial court to refute mother's testimony that the children were bonded to her and that they would benefit from continuing the parental relationship. Instead DCS asserted its view that mother had not met her burden

[19] Because the three girls live together as a result of which M. and J. see P. all the time, we assume the social worker meant to say that M. and J. are more excited than P. to see their mother.

of showing that any exception to termination of parental rights applied. On appeal, DCS does not argue that the children would not benefit from continued contact with mother. Instead, DCS claims that termination of mother's parental rights was appropriate because mother's visits had been sporadic between April and September of 2004. As previously noted, mother was most likely in jail during some or all of the period in question, as evidenced by the social worker's statement that mother had been incarcerated on a probation violation in March of 2004, and would probably serve four months in jail.

To support the trial court's finding that the beneficial relationship exception did not apply, DCS also cites the social worker's statement that P. appears to be parentified as evidenced by the fact that mother relied on P. for information about M. and J. There is no evidence to show that mother relied on P. to parent M. and J. Rather, the evidence shows only that mother relied on P. to provide information to mother because P. lived with M. and J. and, therefore, was in daily contact with the girls. Because the social worker's conclusion is not supported by the evidence, it is meaningless.

Finally, DCS cites the social worker's observation that mother "appears [to] be somewhat immature in dealing with her daughters. She speaks about superficial and material things." This observation is a conclusion unsupported by any facts and as such provides no information about mother. Moreover, even if supported by facts showing what mother actually said or did, the social worker's conclusion that mother is superficial and somewhat immature is hardly damning of mother's parenting skills or of her relationship with her children.

More telling in our view is what DCS does not say, namely, that J. and M. have a parental bond with their foster parents, the paternal aunt and uncle. On this issue, the most DCS asserts is the children "enjoy" living with their aunt and uncle and have not asked to move back with their mother. M. and J. are young girls and cannot be expected to express their desires like the older children do, or adults would. Moreover the absence of a request to live with mother does not demonstrate the absence of a beneficial parental bond with her. The social worker notes in her interim report for the selection and implementation hearing that M. and J. both liked living with their aunt and uncle and are calling them "'mom and dad' most of the time." This evidence falls short of showing that the children are bonded to their aunt and uncle as parents.

We are of the view that mother met her burden of showing that the beneficial relationship exception applies in this case. The evidence shows that mother visited her children as often as permitted under the visitation plan, that she called the children daily, and that the children were bonded with her as their mother, not simply as a friend or acquaintance with whom they occasionally visited and played. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350 ["a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one"].) DCS did not present evidence to counter mother's showing. In our view, the trial court abused its discretion in finding the section 366.26, subdivision (c)(1)(A) exception to termination of parental rights does not apply. Accordingly, we will remand the matter to the trial court for a new section 366.26 hearing to address this issue. (See *In re Amber M.* (2002) 103 Cal.App.4th 681, 691.)

B. Beneficial Sibling Relationship

Mother also argued that the beneficial sibling relationship exception to termination of parental rights set out in section 366.26, subdivision (c)(1)(E), applies in this case. That section provides an exception to termination of parental rights where termination would cause a substantial interference with the sibling relationship: "If termination will substantially interfere with the sibling relationship, section 366.26, subdivision (c)(1)(E) lists numerous factors the juvenile court is to consider in determining whether the circumstance of any given case warrant [*sic*] the application of the exception. First a juvenile court must consider the nature and extent of the relationship, including, but not limited to, factors such as 1) whether the child was raised with a sibling in the same home, 2) whether the child shared significant common experiences, or 3) whether the child has existing close and strong bonds with a sibling. If the relationship exhibits some or all of these factors, the juvenile court must then go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403; see also § 366.26, subd. (c)(1)(E); *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949.)

It is undisputed that the children in this case were bonded to each other. The initial social worker noted the existence of that bond in his jurisdiction and disposition report, as set out above. In addition, the three girls lived in the same home from the inception of this dependency and as a result J. and M. had spent their entire lives with their older sister P. Although G. lived apart initially, he visited his sisters weekly when

mother visited the children in the DCS office, and he often spent weekends with them at the home of their paternal aunt. Ultimately G. was placed in the same home with his sisters. Despite the sibling bond, if J. and M. were ultimately adopted all four siblings would continue to live together in the home of the paternal aunt and uncle. Under the specific circumstances of this case the only interference that would occur to the sibling relationship is that the legal status of the relationship would change. The two older children, P. and G., would no longer be the sister and brother of the two younger children, J. and M. Instead, P. and G. would become the cousins of J. and M. A change in legal status necessarily occurs in every case in which some but not all siblings are adopted and therefore is an inevitable consequence of the adoption process. Accordingly we cannot say that the change in the legal status of the relationship between siblings constitutes substantial interference with that relationship so as to prevent termination of parental rights.

Mother also argues that the children might be separated if G. and P. were returned to mother's custody. That possibility is equally insufficient to compel a finding that the sibling exception applies in this case. First, if adopted, M. and J. would be living with the aunt and uncle of all four children. Because the adoptive parents are also the aunt and uncle of P. and G. it is unlikely that the children would be precluded from visiting each other if P. and G. eventually were to live with mother. More importantly, because of the age differences between the older and younger children it is inevitable that the younger children will eventually live in a home without G., who is now nearly 14 years old, and P., who is nearly 18 years old. The older children will most likely grow up and move out

on their own long before M. (who is four years old) and J. (who is five years old) are grown. Consequently, on the particular facts of this case the trial court correctly found that the sibling exception did not apply.

3.

DENIAL OF G.'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Mother contends that G. was denied effective assistance of counsel in this case because his attorney had an obvious conflict of interest in representing him at the same time the attorney represented J. and M. According to mother, the conflict stems from the fact that the permanent plan recommendation for G. was different from that for J. and M. and therefore the children had different interests that could not adequately be addressed by one attorney. Specifically, mother contends that trial counsel might not have advised G. that he could file a section 388 petition to object to the adoption of his sisters. Mother also claims that in opposing mother's section 388 petition, counsel might have taken a position adverse to G.'s previously expressed desire to reunite with mother. Finally, mother asserts that counsel did not argue the beneficial sibling relationship exception (§ 366.26, subd. (c)(1)(E)) to termination of mother's parental rights and in failing to do so did not adequately represent G.'s interests. DCS contends that an ineffective assistance of counsel claim is more properly raised in a petition for writ of habeas corpus, and that mother lacks standing to raise the ineffective assistance of counsel claim because she has not shown that the purported conflict affects her interests; in any event, there is no conflict of interest in this case. We agree with each of DCS's assertions but will only address the first because it disposes of the ineffective assistance of counsel claim.

Other than the "rare case where the appellate record demonstrates 'there simply could be no satisfactory explanation' for trial counsel's action or inaction," an ineffective assistance of counsel claim is properly raised by a petition for writ of habeas corpus. (*In re. S.D.* (2002) 99 Cal.App.4th 1068, 1077.) This is not that rare case. As reflected in her articulation of the ineffective assistance of counsel claim, whether trial counsel adequately represented the interests of G. while also representing M. and J. depends on what counsel actually advised G. regarding his interests and what G., in turn, actually said to his attorney regarding his desires. Those factual details go to the heart of the ineffective assistance of counsel claim but are not contained in the record on appeal. In short, mother cannot demonstrate inadequate representation on the record before this court and therefore the ineffective assistance of counsel claim cannot be addressed in this appeal.

4.

DELEGATION OF VISITATION TO LEGAL GUARDIAN

Mother contends that the trial court improperly delegated to the legal guardian the power to decide if mother could visit with P. and G. The trial court, in ordering visitation with P. and G. under the permanent plan of guardianship, directed that, "Visitation between the child and parents shall be supervised and arranged by the legal guardians at their discretion." Mother contends the order is erroneous because it does not specify the frequency and duration of visitation and as a result gives the legal guardians discretion to determine not when but whether visitation will occur.

Mother did not object to the visitation order in the trial court. Therefore, DCS contends mother has forfeited her right to challenge the order on appeal. We will address mother's claim, despite her failure to object. (See *In re S.B.* (2004) 32 Cal.4th 1287 [an appellate court has discretion to excuse forfeiture when the case presents an important issue].) We do so in order to clarify the effect of the most recent amendment to the pertinent statute that went into effect only days before the trial court made the visitation order mother challenges in this appeal, and to provide guidance to the trial court on remand.

Resolution of mother's claim that the visitation order is inadequate requires us to recount the evolution of the statute in question, which has undergone two recent amendments, one effective January 1, 2004, and the second, effective January 1, 2005. The Supreme Court recently recounted the statutory evolution in *In re S.B.* and we can do no better here than to quote and paraphrase that opinion liberally. Before the amendment that became effective on January 1, 2004, the pertinent visitation provision was found in section 366.26, subdivision (c)(4).[20] The statutory language regarding visitation was placed at the end of a long paragraph that addressed both legal guardianships and long-term foster care as permanent plans. Placement of the provision created uncertainty, and

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[20] Section 366.26, subdivision (c)(4) stated in pertinent part: "If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child . . . the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. . . . The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child."

a split of opinion in appellate courts,[21] regarding whether the visitation language applied only to long-term foster care or to both foster care and legal guardianship. (See *In re S.B.*, *supra*, 32 Cal.4th at pp. 1294-1295.)

As a result of a statutory amendment that became effective on January 1, 2004, foster care and legal guardianship were addressed in two separate paragraphs of section 366.26, subdivision (c)(4). Section 366.26, subdivision (c)(4)(A), addressed legal guardianships and did not include language regarding visitation. Section 366.26, subdivision (c)(4)(B), addressed long-term foster placements and included language regarding visitation. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1295.) Because the visitation language was included only in the paragraph that addressed long-term foster care, the Supreme Court concluded in *In re S.B.*, *supra*, that "the juvenile court's obligation to 'make an order for visitation' is triggered *only* when the court decides to leave the child with a caretaker who is not willing to become the child's legal guardian, and *not* when . . . the court appoints the child's caretaker as the child's legal guardian." (*In re S.B.*, *supra*, 32 Cal.4th at pp. 1295-1296.) In other words, under the 2004 version of the statute, when the permanent plan is legal guardianship, the court is not required to make a visitation order and may leave visitation entirely to the discretion of the legal guardian.

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[21] We held in *In re Randalynne G.* (2002) 97 Cal.App.4th 1156, that the juvenile court must make a visitation order under section 366.26, subdivision (c)(4), when guardianship is the permanent plan. Our colleagues in Division Three of this court held in *In re Jasmine P.* (2001) 91 Cal.App.4th 617, that a visitation order is required only when long-term foster care is the plan.

In re S.B. would be the end of the story and would resolve mother's claim in this appeal had the Legislature not amended section 366.26, subdivision (c)(4) again. In that amendment, effective January 1, 2005, the Legislature placed the visitation provision in a separate paragraph. As a result, in its current incarnation section 366.26, subdivision (c)(4), includes a paragraph that addresses legal guardianship (§ 366.26, subd. (c)(4)(A)), a paragraph that addresses long-term foster care (§ 366.26, subd. (c)(4)(B)), and a new third paragraph that addresses visitation (§ 366.26, subd. (c)(4)(C)). Section 366.26, (c)(4)(C), which applies in this case because the hearing at which the trial court made the visitation order occurred after the effective date of the amendment, provides: "The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child."

By placing the visitation provision in a separate paragraph, the Legislature made clear its intent to require juvenile courts to make visitation orders in both long-term foster care placements and legal guardianships. (See Assem. Floor Analysis, Assem. Bill No. 2807 (2003-2004 Reg. Sess.) as amended Aug. 23, 2004 at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2801-2850/ab_2807_cfa_20040825_233718_asm_floor.html> [as of Aug. 4, 2005] which notes that one purpose of the most recent amendment was to "restore" the requirement of a visitation order to both long-term foster care and legal guardianship].)

Because the trial court was required to make a visitation order unless it found that visitation was not in the children's best interest, it could not delegate authority to the

legal guardian to decide whether visitation would occur. (*In re Randalynne G.*, *supra*, 97 Cal.App.4th at p. 1164.) The court may delegate authority to the legal guardian to decide the time, place, and manner in which visitation will take place. (*Ibid*.) The visitation order in this case, like that at issue in *In re Randalynne G.*, left every aspect of visitation, other than supervision, to the discretion of the legal guardian. As such, the order was an improper delegation of the judicial function and therefore an abuse of discretion. (*In re Randalynne G.*, *supra*, at pp. 1165-1167.) Accordingly, on remand the trial court must specify not only that mother has a right to visit P. and G., but must also specify the frequency and duration of those visits.

DISPOSITION

The judgments terminating mother's parental rights to J. and M. are reversed and the case remanded to the juvenile court for a new section 366.26 hearing. On remand the court shall conduct further proceedings on the issue of mother's visitation with G. and P. and make a new visitation order that specifies the frequency and duration of those visits. The court shall also make a visitation order that includes the same details if, after the new section 366.26 hearing, the court orders legal guardianship as the permanent plan for J. and M.

CERTIFIED FOR PARTIAL PUBLICATION

/s/ McKinster
J.

We concur:
/s/ Ramirez
P.J.
/s/ Hollenhorst
J.